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A Voluntary Organization Composed of Persons Interested in the  
Improvement of the Bankruptcy Code and Its Administration

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## ADMINISTRATIVE OFFICE

SHARI A. BEDKER

Honorable Pedro R. Pierluisi (Puerto Rico)  
1213 Longworth House Office Building  
Washington, D.C. 20515-5401

Re: Proposed Amendment to Chapter 9 of the Bankruptcy Code relating to  
Puerto Rico Municipalities

Dear Congressman Pierluisi:

The National Bankruptcy Conference is pleased to submit this Statement in response to the request from Mr. Jed Bullock of your office for its views on the legal and policy issues raised by the legislation that would make Puerto Rico municipalities eligible for chapter 9 of the Bankruptcy Code. The Conference is a voluntary, non-profit, non-partisan, self-supporting organization of approximately 60 lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws about any proposed changes to those laws. Attached to this Statement is a Fact Sheet about the Conference, including a list of Conferees.

We have reviewed the draft bill that was attached to your July 11, 2014 email to me. The bill would amend section 101(52) of the Bankruptcy Code to make a Puerto Rico municipality (as defined in 11 U.S.C. § 101(40)) eligible for chapter 9 of the Bankruptcy Code if Puerto Rico specifically authorized its municipalities (or a specified municipality) to be a debtor under chapter 9. The Conference supports the Bill. The Statement is divided into three parts, addressing policy considerations, the language of the bill, and two related constitutional issues.

**Policy Considerations.** Chapter 9 serves a useful purpose, providing the insolvent municipalities of States who choose to make it available with a vehicle for adjusting their obligations while continuing to provide governmental services to their residents and other constituents (such as the patients of public hospitals that fit the Bankruptcy Code definition of municipality). While the chapter 9 case law is not as fully developed as the precedents in chapter 11, nevertheless there is a body of law that provides guidance to courts administering and parties in chapter 9 cases. The Conference sees no bankruptcy policy reason why Puerto Rico's municipalities should not have the same access as municipalities in the States to chapter 9.

**The Bill.** The Conference believes that the language of the bill achieves its intended purpose to permit Puerto Rico to authorize its municipalities to use chapter 9, subject to the eligibility and other requirements currently imposed by the Bankruptcy Code on the States.

**Potential Constitutional Issues.** The Conference does not see any impediment in the U.S. Constitution to giving Puerto Rico the same right as States to authorize its municipalities to file for chapter 9 relief. However, questions may arise about the intersection between the bill and the Public Corporation Debt Enforcement and Recovery Act enacted by Puerto Rico in June 2014 (the “Commonwealth’s Act”). The issues are complex both because of the unclear federal law treatment of Puerto Rico (*e.g.*, when the Commonwealth is and is not treated like a State) and due to uncertainty about the vitality of a U.S. Supreme Court decision upholding New Jersey’s municipal restructuring statute in *Faitoute Iron & Steel Co. v. City of Asbury Park, N.J.*, 316 U.S. 502 (1942). The Bankruptcy Code contains a provision that Congress intended to invalidate state laws that purport to bind a non-consenting creditor to a composition of indebtedness. 11 U.S.C. § 903. Congress intended to overrule *Faitoute* with the predecessor provision to section 903, but it is far from certain that section 903 achieves that objective. The doctrinal scope of the invalidation is fuzzy as well. Compare *City of Pontiac Retired Employees v. Schimmel*, 751 F.3d 427, 430-31 (6th Cir 2014) (stating in a per curiam opinion that the plain language proscription in section 903 is not limited to application in bankruptcy cases) with *id.* at 433 (concurring opinion) (stating that “[t]he exception appears to reflect congressional intent that where chapter 9 is invoked, it does operate to limit or impair State power in relation to the specific type of State law described in subsection (1).”); *Ropico, Inc. v. City of New York*, 425 F. Supp. 970 (S.D.N.Y. 1976) (reviewing history of enactment of predecessor to section 903 and distinguishing between state law compositions and extensions of indebtedness). Enactment of the Bill, allowing Puerto Rico to authorize its municipalities to file for chapter 9 relief, would ensure immediate access to debt adjustment for Puerto Rico on a less constitutionally-contested basis than the Commonwealth’s Act.

Because a court might determine that the amendment is unconstitutional if applied retroactively and therefore decline to apply it to existing secured debt (*see U.S. v. Security Industrial Bank*, 459 U.S. 70 (1982); *Holt v. Henley*, 232 U.S. 637 (1914)), we recommend that the bill be amended to provide expressly for retroactive application and to include a severability clause.

\* \* \* \* \*

Due to the short time for response to the request, we have provided our assessment in summary fashion. We would be pleased to address issues in more detail should your office so desire, and the Conference remains available to answer any questions your office may have.

Very truly yours,

*s/ Richard Levin*

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<sup>1</sup> The views expressed in this letter are those of the Conference, on whose behalf this letter is being written, and do not necessarily reflect either my personal views or those of my law firm, Cravath, Swaine & Moore LLP.

# NATIONAL BANKRUPTCY CONFERENCE

*A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.*

**History.** The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

**Current Members.** Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

**Policy Positions.** The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

**Technical and Advisory Services to Congress.** To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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